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Date: January 17, 2001

Case No.: **1998-LHC-2391**

OWCP No.: **06-163357**

In the matter of

CARLTON WATSON,
Claimant,

v.

SEALAND SERVICES, INC./
SIGNAL MUTUAL ASSOCIATION
c/o CRAWFORD & COMPANY,
Employer/Carrier.

Representation: Douglas Daze, Esq.
For the Claimant

James F. Moseley, Jr., Esq.
For the Employer

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers, Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Jacksonville, Florida on June 27, 2000 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the

arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Claimant and the Employer have stipulated to the following:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An Employer/Employee relationship existed on various dates during the summer of 1994.

3. The average weekly wage was $840.00 in July 1994.

Issues

1. Whether or not the Claimant sustained an injury on or about July 22, 1994 while he worked for the Employer?

2. Entitlement to temporary total disability from July 22, 1994 to October 31, 1998 (as stated at the hearing), or entitlement to temporary total disability from January 1, 1996 to October 31, 1997 (as stated in Claimant’s brief).

3. Entitlement to temporary partial disability from November 1, 1997 to October 31, 1998 (as stated in the brief).

4. Entitlement to reimbursement to the ILA pension and welfare fund for the medical payments paid by them for medical treatment provided for the “alleged” July 22, 1994, accident.

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[1] *The following abbreviations will be used as citations to the record:*

TR - Transcript of the Hearing;
CX - Claimant's Exhibits;
EX - Employer's Exhibits.

Preliminary Matters

EX 1-6 and EX 7, the hearing notebook, were entered into the record at the hearing. Subsequently, the Employer submitted

EX 8 a July 30, 1993 statement from Richard Sandoval.
EX 9 a July 25, 2000 deposition of Dr. Keller.

EX 8 and EX 9 are entered into the record.

CX 1 the deposition of Dr. Bremer was admitted at the hearing. Counsel was to provide CX 2, disability reports from Dr. Jones, but these were not provided.

Contentions

The Claimant states that in July 1994, he was on light duty with the Employer as a result of injuries in 1993. In July 1994, he twisted his back while painting chock locks.

It is argued that

> Mr. Watson clearly established that his condition and complaints arose from activity he performed on his job in July of 1994. Dr. Jones' records date the complaints from this date and Dr. Bremer diagnosed a herniated disc which he related to Mr. Watson's July accident. The employer here has merely tried to create a question as to whether the accident occurred July 20 or July 22, 1994. Certainly this is not sufficient to overcome the Section 920(a) presumption. The employer has also attempted to create some medical question regarding causation.

The Employer states that

> The Claimant is alleging that he suffered a work related injury on July 22, 1994 a date when Mr. Watson was not working. The Claimant has also given a variety of versions of how his accident occurred to various doctors and in sworn testimony. For this reason Claimant's history of how his complaints occurred is not reliable.

> Claimant has not been forthright and truthful about either the date or description of the accident. His latest version was his testimony the day of hearing when he testified his back pain began prior to July 1994 and even begin in 1993. If this latest version were true, then that claim has already been settled and he is not entitled to additional compensation. Further, the medical evidence, particularly the opinion of Dr. Keller shows that Claimant did not suffer a work related injury. As such, Claimant is not entitled to benefits pursuant to the LHWCA.

Evaluation of the Evidence

At the hearing, the Claimant testified that in 1993 he was working as a refrigeration mechanic for Sealand. He sustained an injury and returned to work on light duty in 1994.

In 1994, he was spray painting locks on containers. When he returned from one chassis to another he felt a sharp pain down the side of the left leg. He informed a supervisor who told him to see his treating physician.

Watson went to Dr. Jones who provided therapy, pain pills, and muscle relaxants. He subsequently worked a few days in 1994 but the physician took him out of work.

He was referred to Dr. Bremer in 1996 and surgery was performed. He last saw that physician in early 1998.

> [The undersigned must point out that the record does not contain a list of the days that Watson worked for Sealand in 1994. In addition, the only records traceable to Dr. Jones, who presumably provided all treatment between 1993 and 1995, are contained in EX 7, sections 2, 5, and 6.]

In October 1993, an MRI of the cervical spine was conducted at the request of Dr. Jones. [EX 7, section 6].

In November 1993, a Sealand employee advised the insurance adjuster that

> Based upon the 15 pound restriction and no lifting hands over head, Mr. Watson was offered the 'drivers' job, which consists of driving a yard hostler. The yard hostler is a specialized vehicle designed for conveniently moving container/chassis, into and out of parking locations. Mr. Watson declined this job, saying that he could not do this. This job is considered 'light' duty.
>
> After I had offered him the above job, Bill Lowder asked him if he could do container inspections on the yard. This job consists of driving a pickup truck on the yard and going to a specific location in the yard, getting out of the vehicle, getting in a container and sweeping out the container, if needed. Mr. Watson said that he could not do this.
>
> This work was available to Mr. Watson on November 22 and is still available at this time. [EX 8].

EX 7, section 2 consists of a September 22, 1994 office note from Dr. Jones. This note stated, in part

> The question of the relationship of the low back injury to the initial injury on 8/25/93 is discussed with the patient. As discussed in the office note of 8/4/94, the patient started complaining of low back pain while doing a lot of walking at work. At that time he was on limited duty because of the restrictions related to his neck. The patient did not have a specific incident that caused the low back pain.

EX 7, section 5 contains page 25 of the transcript of a November 1994 deposition of Dr. Jones. That page, in total, states that

> office note of 9/22/94 and that was that Mr. Watson complained of low back pain beginning while he was walking at work and he did not complain of low back pain with his original injury. The office note of 9/26/94 I said it's false that I did not tell the Workmen's Compensation carrier that his back pain was not related to work, I said it was not related to the work injury of 8/25/93 when he hurt his neck

and that's -- that specifically is what I was addressing in this note of 9/26/94.

Q Okay. Just so that the record is clear, is it your opinion that the low back pain is a work-related injury but it's separate from his initial injury of 8/25/93?

A It is separate from the initial injury on 8/25/93 and the low back pain is related to the -- to his work because that's what the patient described to me as the initiation of the injury.

Q Okay. Doctor, when was the next time that you had an occasion to see Carlton Watson after 9/26/94?

A I've not seen him since then.

Q Okay. Doctor, I see a Notice of Claimant Disability Status Form in my copies of your records dated 9/28/94 that says -- that has checked off that Mr. Watson is temporarily unable to return to work. Do you have that in your file?

When deposed in November 1994, Watson testified that he started working for Sealand as a chassis mechanic in June 1988. In August 1993, he injured his upper back while trying to move a scaffold. He returned to light duty in January 1994 and on some days he would paint twist locks, and he performed other duties.

He indicated that he would have pain in the low back when painting the locks as this job required a lot of walking between chassis. When asked when he first experienced back pain Watson testified that

My lower back was hurting all the time. I mean, it wasn't from '93. I mean, from that time on my back period it was hurting all over from that time there. It never stopped hurting me. When I started in January from all that walking, it persisted even more.

Q And you're making reference to the walking you did in relation to the painting of the twist locks?
A Yes. [EX 2, p. 57].

In January 1996, Dr. Bremer, a neurosurgeon, examined Watson at the request of Dr. Jones. Clinical history indicated that there was a

> finding of a small herniated disk on the left side of L5, S1 diagnosed on an MRI of the lumbar spine on 1994. This man has been complaining of a low back pain radiating down to the left lower extremity. In addition, he also feels stiff coldness on the back of the neck. He cannot sleep well because the pain wakes him up. The left foot gets tight. There appears to be some weakness of the left foot. He has been treated conservatively with symptomatic treatment. He said that this problem in the lower back started hurting when he was on light duty on 08-09-94, and he was in and out of the pick-up truck with twisting motions, however he did not have any type of falls or any other type of problem.

Following examination, the impressions included low back pain, rule out HNP. [EX 7, section 4; CX 1].

A lumbar myelogram in January 1996 revealed a

> very small left posterolateral disc herniation at L5-S1 with no significant abnormality of the thecal sac grossly demonstrated. There does appear to be probable mild compression of the S1 nerve root.

Dr. Bremer suggested surgery and stated that Watson was unable to work. In May 1996, the Claimant under a left L5-S1 hemilaminectomy. [CX 1].

In September 1996, Dr. Bremer stated that Watson was totally disabled from January 9, 1996 to October 6, 1996 and could return to restricted light duty as of October 7, 1996. In subsequent months, Watson reported that he could not work as a mechanic which was heavy work. Dr. Bremer provided frequent treatment through early 1998.

Dr. Keller, an orthopedic surgeon, examined Watson in March 1997. Watson provided a clinical history and Dr. Keller and had records from September and December of 1994. The later record was an MRI that suggested a small herniated disc at L5-S1 on the left.

Following examination Dr. Keller stated that

> If as stated in the clinic notes the patient developed low back pain while walking, then I can not explain a relationship between the two. We use walking frequently as a form of exercise, but the patient claims to me that he was making some kind of self role and thus had a more acute onset. Obviously, there is some discrepancy here, but given the reports from the other orthopaedist I would have to conclude that the patient' s low back problem including the herniation is unrelated to the workers compensation case for which he is also being treated. The time of the onset of the low back pain was under significant work, restrictions and given those, I can not imagine how he could have placed an axial load on his lumbar back to cause a disc herniation other than it being a natural occurrence secondary to degenerative processes.
>
> Thus, I conclude the patient's disc herniation is not related to a work injury. I think his treatment has been appropriate. If there is a question about his function at this time, I would recommend a FCE and have him return to work as indicated by the same. [EX 7, section 7].

When deposed in January 1999, Dr. Bremer testified that a herniated disc could be caused by minimal events such as sneezing or bending over. The majority of patients fully recover within three months of surgery but up to 25% continue to have problems. Standard light duty restrictions were assigned in September 1996 but Watson attempted heavier work and was unable to perform.

On October 1998, Dr. Bremer signed a restrictions certificate which stated that Watson was totally disabled from January 9, 1996 to October 5, 1998. As of October 5, 1998, it was reported that the Claimant had not been able to return to his usual occupation. [CX 1].

When deposed in July 2000, Dr. Keller testified that following examination in 1997 the physician concluded that

> the onset of his pain coincided with no particular injury or trauma to his back and was rather spontaneous and consistent more with just degenerative disk disease as opposed to a work injury per se.
>
> Q And was it your conclusion, Doctor, that the patient's problems were not work-related?
>
> A Given the history that I had -- and his history is a little bit confused, at least at that time. But given the history I had from the other orthopaedists or the treating doctors that I had available to me to review that he did not have enough trauma or injury to account for his back pain.
>
> He wasn't really doing anything at the time it started was my impression, that I came away with. And therefore, I couldn't relate his back pain to work other than the fact that he was at work but he wasn't doing anything to cause it. [EX 9, p. 11].

Watson was also deposed in December 1998 [EX 4], in January 2000 [EX 1], and in April 2000 [EX 3].

Discussion

In determining whether the employee has sustained an injury compensable under the LHWCA, one must consider the relationship between Section 2 (2) and 20 (a) of the LHWCA. Section 20 (a) establishes a presumption of injury in favor of the claimant if he establishes the elements of prima facie case. In the absence of substantial evidence to the contrary it is presumed that the injury claim comes under the Act.

In order to be entitled to the statutory presumption, the employee must first establish a prima facie case. The claimant has the burden of establishing that 1) he sustained physical harm or pain; and 2) an accident occurred in the course of employment, or conditions existed at work which could have caused the harm or pain. Kier v. Bethlehem Steel Corp, 16 BRBS 128 (1984).

Once Claimant has met this dual burden or establishing that he has suffered harm and that the alleged accident in fact occurred or the alleged working conditions existed, the Section 20(a) presumption of casual connection (that the harm was caused by the accident or working conditions) applies. The presumption thus operates to link the harm with the injured employee's employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981).

In this case, the date of the alleged injury, dates of work, and circumstances surrounding the “alleged” injury have fluctuated.

There is some indication that Dr. Jones saw the Claimant in August 1994, but the report in September of that year clearly reflects physical impairment. In addition, the job duties in painting locks could have caused such harm. The minimal reports from Dr. Jones, and the records from Dr. Bremer support such a conclusion.

For discussion purposes, I find that the Claimant has made a prima facie case under Kelaita, supra.

Once the §20(a) presumption applies, the relevant inquiry is whether Employer succeeded in establishing the lack of

casual nexus. Dower v. General Dynamics Corp, 14 BRBS 324 (1981). Employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on more hypothetical probabilities in rejecting a claim is contrary to the presumption created in §20(a). Steel v. Adler, 269 F. Supp. 375 (D.D.C. 1967). See also Smith v. Sealand Terminal. Inc, 14 BRBS 844 (1982); Dixon v. John J. McMullen and Associates Inc, 13 BRBS 707 (1981). Highly equivocal evidence is not substantial and will not rebut the presumption. Dewberry v Southern Stevedoring Cue, 7 BRBS 322 (1977), aff'd mem., 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978).

The Employer relies on the absence of documented trauma in 1994 and the discrepancy in the Claimant's statements. Moreover, Dr. Keller has expressed the opinion that the reported activities at work in 1994 could not have produced a chronic lumbar impairment.

In view of the above, I conclude that the Section 20 (a) presumption has been rebutted and this administrative law judge must weigh all the evidence and resolve the case on the record as a whole.

> Under the substantial evidence rule, the administrative law judge's findings, must be based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See DelVecchio v. Bowers, 296 U.S. 280 (1935).

In view of the paucity of records from Dr. Jones, I would be inclined to quickly deny the case. However, Dr. Keller's notes indicate that an MRI in late 1994 showed a herniated disc.

Dr. Keller states that the Claimant's actions in 1994 are not consistent with the development of a herniated disc. However, Dr. Bremer states that such an impairment can be caused by minimal activity, and this physician relates this disorder to work activity in 1994.

While Dr. Bremer attributes the impairment to work activity this opinion is based on the Claimant's statements without documentation of a traumatic event. Moreover, this physician has stated that herniation can be caused by sneezing and by other usual daily activities.

Dr. Jones' records are fragmented, and Dr. Bremer's opinion was expressed several years after the presumed event, borders on speculation, and acknowledges that the damage could be due to other causes. Therefore, the undersigned does not find it reasonable to relate the herniated disc to work activity at Sealand. See Director, OWCP v. Maher Terminals, Inc., 114 S.CT. 2251 (1994).

ORDER

Claims for benefits based on a lumbar spine injury in 1994 are **denied.**

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia